Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In Re Application of	)	
ALLEGHENY COMMUNICATIONS GROUP, INC.	)	File No. BPH-910628MC
For Construction Permit for a New FM Radio Station on Channel 229B, Pittsburgh, Pennsylvania	)	

TO: The Commission

OPPOSITION TO PETITION TO DISMISS OR DENY

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TABLE OF CONTENTS

SUMMARY

EZ's Petition to Dismiss or Deny is nothing more than a frivolous ad hominem attack that should be stricken.

EZ's technical arguments are insubstantial and lack merit. Allegheny's proposal complies with all pertinent Commission rules. Allegheny properly utilized Section 73.213 of the Commission's rules. Its other technical arguments are strained or are based upon misapplications of the rules.

EZ's abuse of process arguments are totally baseless. Its theory that Allegheny filed its application for purposes of settlement is utterly without foundation. Allegations that counsel committed a crime by reviewing a transcript handed him by a court employee is unsupported. EZ's references to applications in which Allegheny's principals were not involved are utterly irrelevant.

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OPPOSITION TO PETITION TO DISMISS OR DENY

Allegheny Communications Group, Inc. (Allegheny), by its attorneys, now opposes the "Petition to Dismiss or Deny" filed by EZ Communications, Inc. (EZ) on December 6, 1991.

EZ argues that Allegheny's application should be dismissed because (1) it allegedly contains technical defects and (2) because Allegheny, its principals, and counsel have allegedly abused the Commission's processes. EZ's technical arguments are insubstantial and lack merit. EZ's abuse of process arguments are nothing more than an ad hominem attack on counsel that does not belong in a pleading filed with the Commission.

I. Allegheny's Technical Proposal Complies With All Commission Requirements

radical distortions of the Commission's rules. EZ has not competently shown that Allegheny's technical proposal fails to comply with any Commission rule. EZ's technical arguments are insubstantial and do not justify the draconian remedy of dismissal.

A. Spacing Requirements

EZ first argues that Allegheny's proposal must be dismissed because it does not comply with the spacing requirements with respect to WQIO(FM), Mt. Vernon, OH. Its argument ignores the applicable rule, and absolutely no pertinent authority is cited in support of its argument.

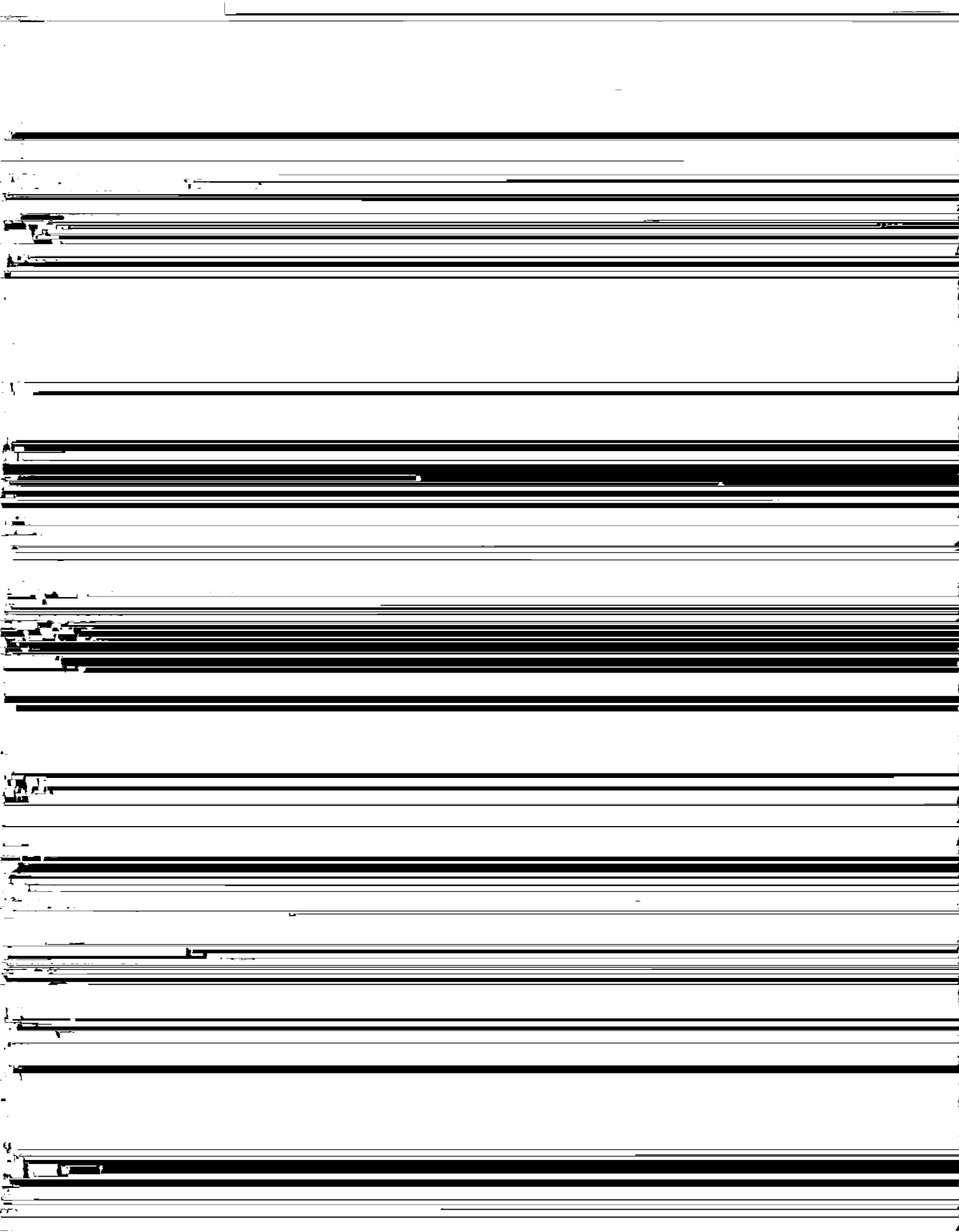
As noted in the attached Engineering Statement of Laura M. Mizrahi (submitted as Attachment 1 to this opposition), EZ's facilities are short-spaced by 36.2 km to WQIO. A grant of Allegheny's application would actually reduce that short-spacing by 1.9 km, to 34.3 km. EZ is therefore asking the Commission to dismiss an application that would actually improve the short-spacing.

Allegheny's technical proposal is authorized by Section 73.213(a) of the Commission's rules. That rule provides with respect to grandfathered short-spacing stations (i.e., stations on which the short-spacing existed as of November 16, 1964), a transmitter site or technical proposal may be modified so long as the

proposed 1 mv/m contour "is not extended towards the 1 mv/m contour of any short-spaced station." Mizrahi Statement, P. 1. EZ does not challenge the showing in Allegheny's application that the Allegheny 1 mv/m contour does not extend past EZ's current 1 mv/m contour in the direction of WQIO.

EZ's consulting engineer argues that Allegheny cannot take advantage of Section 73.213 of the Commission's rules because Allegheny is a comparative renewal challenger. Statement of Herman E. Hurst, Jr., Pp. 2-3. This argument has no basis in either law or policy. Allegheny is seeking the same station for which EZ currently holds a license: Channel 229B in Pittsburgh, PA. Nothing in the rule indicates that the ability to take advantage of the rule is lost when ownership of the station changes. Otherwise, an assignment of license would eliminate the assignee's ability to change facilities.

EZ's argument is also undercut by the fundamental limitation that the Commission may not impose disparate requirements on renewal challengers that would create a pro-incumbent bias in comparative hearings. In Las Vegas Valley Broadcasting Co. v. FCC, 589 F.2d 594, 600 (D.C. Cir. 1978), the Court of Appeals faulted the Commission for imposing an unreasonably strict financial qualifications standard on a renewal challenger. Acceptance of



has met that requirement. The order does not address a challenger's ability to use the same technical rules available to an incumbent. Indeed, the elimination of

consider all amendments filed during the as of right period. FM Applications Processing, 58 RR 2d 776, 784-785 (1985). Since EZ's argument is not based upon the proposal that the Commission evaluates in its acceptability study, the argument can be summarily ignored.

In any event, the argument is invalid even if Allegheny's original proposal is considered. Section 73.316(a)(2) of the Commission's rules does limit the rate of attenuation in Allegheny's directional pattern to 2 dB per ten degrees of azimuth. Table I of Allegheny's original application (Attachment 2 to this opposition) shows that Allegheny fully complied with this limitation. EZ arrives at different figures for ERP by improperly recalculating the ERP based upon rounded relative field figures. Mizrahi Statement, Pp. 2-4. For the reasons stated by Ms. Mizrahi, EZ's recalculations are invalid and improper. Moreover, even if EZ's calculations could be considered correct, the differences would be rounded to the permissible limit of 2 dB under Commission policy. Mizrahi Statement, P. 3.

EZ's allegations concerning Sections 73.316(c)(5) and (c)(7) of the Commission's rules are also meritless. Allegheny's application contains all of the technical information the Commission needs to evaluate Allegheny's proposal. The Mass Media Bureau does not require the statements referred to in the cited rules to be

explicitly contained in a construction permit application. The statements are implicitly made in the filing of the application and specification of a particular antenna, and all sections of the directional antenna rule must be complied with when the license application is filed. Mizrahi Statement, P. 4. Ms. Mizrahi's firm has had a multitude of FM applications granted based upon this understanding. Id. Moreover, EZ presents no authority for the proposition that the absence of those statements (as opposed to the absence of substantive information concerning the proposal) could justify the draconian remedy of dismissal.

C. Air Hazard Argument

EZ's argument that Allegheny's proposal could constitute a hazard to air navigation willfully ignores the rules of the Federal Aviation Administration (FAA) and the Commission. The attached affidavit of John Allen, an experienced airspace consultant (Attachment 3 to this opposition) demonstrates that Allegheny's proposal is not a hazard to air navigation as defined by the Commission. Allegheny was not required to notify the FAA of its proposal under FAA rules because Allegheny proposes to mount on an existing tower without increasing the structure's height. Attachment 3. Under Section 17.4(c) of the Commission's rules, an application "will be deemed not to involve a hazard to air navigation..." if FAA notification is not required. Mizrahi Statement,

P. 5. EZ's use of a computer program to predict interference was not authorized within the framework of Part 77 of the FAA's regulations. Attachment 3, P. 3.

EZ's arguments become even more strained when it is considered that they are requesting dismissal of Allegheny's application. The correct course of action to take if a proposal could constitute a hazard to air

FCC Form 301 does not require the depiction of other antennas. Mizrahi Statement, P. 6.

EZ's engineer also challenges Allegheny's assertion that the structure is FAA painted and lighted. Hurst Statement, P. 7. Before Allegheny filed its application, however, Ms. Mizrahi contacted AT&T, the tower owner, who informed her that the structure complied with the FAA's requirements. Mizrahi Statement, Pp. 6-7. AT&T personnel currently indicate that the structure is lighted. Id., Pp. 6-7. EZ has totally failed to show that Allegheny attempted to deceive the Commission. Allegheny has no current obligation to ensure that the

availability. Mizrahi Statement, P. 6. Finally, even if EZ had competently proven its allegations, the remedy would not be dismissal but specification of a site suitability issue. See, e.g., A.C. Elliott, Jr., 51 FCC 2d 301, 32 RR 2d 1128 (Rev. Bd. 1975).

E. RF Radiation

Finally, EZ alleges that Allegheny has not considered exposure to workers on the roof of the building in question. Hurst Statement, P. 8. Again, EZ ignores Allegheny's August 30, 1991 amendment. Page 5 of the engineering statement for that amendment details the measures Allegheny will take to protect workers on the roof of the building. Mizrahi Statement, P. 8. The structure is not a building within which people work or reside. Again, if the Commission believes a question remains as to Allegheny's compliance with ANSI, the proper response is not dismissal but a request for further information and specification of a contingent environmental issue. See, e.g., Barbara Key Peel, supra. Accordingly, EZ's request for dismissal of Allegheny's application on engineering grounds is frivolous and must be denied.

II. Allegations As To Allegheny's Motives Are Frivolous

EZ makes an extended, vitriolic attack on the motives of Allegheny that is so patently devoid of support in fact or law as to be frivolous. It

constitutes scandalous matter that should be stricken pursuant to Section 1.52 of the Rules. The arguments advanced are essentially the same as arguments recently stricken by the Commission in Fresno FM Limited Partnership, FCC 91-375, released November 27, 1991 at P. 3 n.3 (Fresno). A copy of Footnote 3 and the Motion to Strike which it addressed are attached hereto as Attachment No. 4 for convenience. Similar arguments have also been stricken by Administrative Law Judge Arthur I. Steinberg in Western Cities Broadcasting, Inc., FCC 91M-1683, released May 22, 1991 at n.1 (this decision and the passage stricken are attached hereto as Attachment No. 5). Judge Steinberg commented:

> "Such personal attacks have no bearing on the questions to be resolved, and do not advance the applicant's cause. They are unprofessional, improper, and should be discontinued."

That EZ has chosen to resort to such tactics serves only to reflect adversely on its own qualifications to be a Commission licensee, especially in light of the issues previously raised as to its qualifications. This is particularly so since Judge Steinberg's ruling was previously brought to EZ's attention at P. 14 of

allegation essentially founders on the fact that the Commission has changed its rules to eliminate the possibility of an applicant profiting from a settlement. First Report and Order in BC Docket No. 81-742, 4 FCC Rcd 4780 (1989) (FRO). Allegheny's application was filed well after the new rules went into effect. Under these circumstances, a party would face a very heavy burden of showing that an application was filed to achieve a result that is barred by the Rules. EZ's Petition is in fact devoid of even a scintilla of evidence.

At Pp. 6-7 of its Petition, EZ notes that the new rules permit expenses only settlements after an initial decision. This reflects the Commission's conclusion that prosecution through an initial decision is a "persuasive indication" of the applicant's good motive and further that the leverage for an unfair settlement is "dramatically diminished" after an initial decision. FRO, para. 26-28. EZ criticizes this aspect of the Rules; however, this is merely a collateral attack on the FRO that has no bearing on Allegheny. Moreover, EZ's speculative scenario is without merit since, as discussed in FRO, para. 28, an applicant may have little leverage to compel a settlement even for expenses after hearing, especially in the face of an adverse initial decision. No applicant could assume at the time of filing that it would necessarily receive a post-hearing settlement

offer. Finally, EZ misperceives the purpose of the new Rules. As emphasized at FRO, para. 29, the Rules are intended only to eliminate the abuse of profiting from the application itself and not to deter the filing of legitimate renewal challenges.

EZ's essential allegation is thus purely anachronistic, being premised on past problems the Commission addressed well prior to the filing of Allegheny's application. Its subsidiary allegations are also purely specious.

A. Allegheny's Interest In Pittsburgh

EZ alleges that Allegheny has no interest in Pittsburgh because its principals don't live there and will not be extensively involved in day-to-day station operations. This is a hypocritical argument given that EZ itself is a multiple licensee. Its Annual Ownership Report filed May 14, 1991 on behalf of 5 stations (including WBZZ) reflects no local ownership apart from Edward Meyer (the WBZZ manager) who owns about .08 percent of EZ's stock. EZ itself, as well as much of its ownership, is located in the Washington, D.C. area. The Commission obviously does not preclude non-local ownership nor does it view it as evidence of a lack of commitment to the community of license, as reflected by the absence of any precedential support for EZ's claim.

EZ also notes that the programming statement in Allegheny's application is not extensive, although no

claim is made that it is deficient. It clearly affirms Allegheny's commitment to provide programming responsive to the needs of its Pittsburgh service area. The Commission has long since abandoned requirements for extensive program planning at the application stage, which would likely be wholly outdated by such time as Allegheny receives an authorization at the conclusion of a potentially lengthy comparative proceeding.

EZ also questions whether Allegheny had any basis for filing an application for KDKA. In fact, as

involved in settlements. In fact, both settlements were approved by the Commission, including the requisite findings that none of the applications were filed for the purpose of settlement. Section 311(d) of the Communications Act of 1934, as amended (the Act). EZ seeks to collaterally attack these prior findings based solely on speculation concerning facts known at the time, which is patently unacceptable. Nor were any adverse findings otherwise made concerning the qualifications of either entity. As EZ notes, Potomac was found in an initial decision to be the comparatively superior applicant.

Both applications arose in the context of proceedings concerning licenses held by RKO General, Inc. (RKO). The RKO cases are unique in that the Commission not ony permitted but affirmatively sought to facilitate and promote settlements. RKO General, Inc. (KHJ-TV), FCC 86-383, 60 RR 2d 1694 (1986); RKO General, Inc. (KHJ-TV), 3 FCC Rcd 5057 (1988). All cases involving RKO ultimately were settled. In view of the Commission's posture, it cannot be considered surprising - as EZ suggests - that Potomac also settled notwithstanding its success at the initial decision stage. Not only was the initial decision subject to appeal, but even if Potomac prevailed it still faced the possibility of years of litigation with RKO (assuming RKO were not found dis-

qualified), whose basic qualifications and renewal expectancy case was not involved in the initial decision. It was entirely reasonable for Potomac to accept the formula for settlement desired by the Commission as did every other applicant for an RKO facility.

Even if there were any questionable conduct by Potomac or LATV, it is clear from Footnote 3 of Fresno, supra, that this cannot be cited as evidence that Allegheny has engaged in similar conduct. This is particularly so given that Mr. Long had minority interests in both entities (particularly LATV, where he merely held a small limited partnership interest) and no evidence has been produced that he either knew of or participated in whatever questionable conduct EZ believes to have occurred. The conclusion is further reinforced given the intervening rule change that precludes settlements such as those approved in the RKO cases.

C. Counsel's Investigation of EZ

EZ suggests that Allegheny's counsel, Lewis I. Cohen, may have been guilty of criminal contempt of a Pennsylvania court by inspecting and copying a transcript provided to him by a court employee. Initially, the

cited as evidence of a "penchant to abuse processes." Petition at n.26. The circumstances may well evidence such a "penchant" on EZ's part; however, the allegation clearly does not constitute evidence cognizable under Section 309(d)(1) of the Act relevant to the inquiry sought against Allegheny.

The allegation is further defective in that EZ has failed to allege that any criminal conviction has been entered against Mr. Cohen by a competent local authority. The Commission will not consider alleged criminal violations in the absence of an adjudication by the appropriate local authority. Policy Statement on Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 59 RR 2d 801, 819 (1985). EZ ignores this requirement; however, it may intend to argue that the policy should not apply because Mr. Cohen has "admitted" facts constituting the alleged violation. There is no such exception to the policy excluding unadjudicated allegations of a criminal violation. Moreover, the facts provided by Mr. Cohen would not have permitted this Commission to conclude that the alleged violation occurred, given the elements of the crime as alleged at P. 4 of Exhibit 3 of EZ's Petition. In substance, the alleged crime requires a (1) knowing violation with a (2) wrongful intent of an (3) absolutely unambiguous order of which the violator had (4) clear notice.

EZ has initially failed to show even the existence of the court order Mr. Cohen allegedly violated. Thus, it has submitted no direct evidence of any order by the Judge sealing the specific transcript Mr. Cohen read and copied. The portion of the transcript provided previously as Attachment No. 8 of Allegheny's June 28, 1991 Petition To Deny states as follows at P. 2.:

> "Further, the parties agree that the record on appeal at G.D. 88-02730, the parties agree that the entire record will be sealed by Court Order, including transcripts of testimony, any pleadings, documents filed, any briefs, letters that were attached as exhibits to those briefs or records. All will be sealed by Court Order" (emphasis added).

It is not unambiguously clear that the sealing of the particular non-testimonial transcript seen by Mr. Cohen was contemplated by the above comments. It is also unclear whether the above comments are themselves a court order or merely a description of a court order that would be issued at some future date. EZ has not supplied any such court order. Attached hereto as Attachment No. 6 is a further Declaration of Mr. Cohen reflecting that he was not provided with and has never seen any written court order.

EZ does supply the affidavit of a court reporter (Exhibit 4) who asserts at P. 1 that the Judge noted "particularly on the record that the transcript of the conference was to be placed under seal." This is unsup-

ported by a transcript citation. It is not supported by Mr. Cohen's copy of the transcript. Mr. Cohen's attached Declaration reflects that he has no recollection of reading such a statement in the transcript given to him or of excluding from his copy anything relating to the sealing of the record. Indeed, it cannot be determined whether the reporter's statement refers to an alleged comment in the transcript that was not copied by Mr. Cohen[1/] or is merely her interpretation of the comments copied by Mr. Cohen. The reporter's vague hearsay remark cannot serve to establish the existence of a court order otherwise unsupported by any official document from the court. This is particularly so since the reporter admits at P. 2 of her affidavit that this was her first encounter with a sealed record and she had no direct knowledge of the proper procedures.

Mr. Cohen's attached Declaration also provides additional details concerning his request for records to the Prothonotary's Office. As reflected therein, Mr. Cohen voluntarily raised with a court officer the issue of whether an envelope he had been given might contain sealed matter and voluntarily reported his prior

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1/If so, it would appear that (under EZ's theory) the disclosure of excerpts of the transcript not previously disclosed by Mr. Cohen would place both the reporter and EZ in criminal contempt.

conversation with the court reporter. The circumstances reflect that Mr. Gaber made every effort to ensure the

was, that Mr. Cohen had notice thereof. Finally, the transcript does not disclose the essential term of the

Allegations of criminal violations are serious matters that ought not to be lightly interposed. Here, there is no non-frivolous basis for EZ's allegation. It should appropriately be recognized as scandalous and should be stricken pursuant to Section 1.52 of the Rules.

D. Unrelated Applications Represented By Counsel

EZ finally seeks to support its allegation against